

May 25, 2005

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE MICHAEL BARTON MYERS,
formerly doing business as Myers &
Myers, LLC,

Debtor.

BAP No. KS-04-054

CHERYL D. MYERS,

Appellant,

v.

MICHAEL BARTON MYERS, and
UNITED STATES TRUSTEE,

Appellees.

Bankr. No. 01-41991-11
Chapter 11

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before BOHANON, CORNISH, and BROWN, Bankruptcy Judges.

PER CURIAM.

The Appellant requested oral argument, but the Appellees did not. After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

The pro se Appellant, Cheryl Myers, appeals an order from the bankruptcy

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

court denying her motion to alter or amend a previous order dismissing the Debtor-Appellee's Chapter 11 bankruptcy petition. For the reasons explained below, the Court affirms the bankruptcy court.

Background

Michael Myers, the Debtor-Appellee ("Debtor"), is the Appellant's ex-husband. The Debtor filed a Chapter 11 petition in California, but it was later transferred to the bankruptcy court in Kansas.

Judge James A. Pusateri initially presided in the Debtor's Chapter 11 proceedings. The Appellant filed a judicial complaint against Judge Pusateri in which she asserted that Judge Pusateri improperly ruled for the Debtor and that he failed to disqualify himself in the Debtor's case. The Judicial Council of the Tenth Circuit ultimately dismissed the Appellant's judicial complaint.

After Judge Pusateri retired, the Debtor's case was assigned to Judge Dale L. Somers. Even though Judge Pusateri was no longer presiding in the Debtor's case, the Appellant filed a motion to disqualify him. No order was ever entered disposing of this motion.

The Debtor never filed a proposed plan of reorganization or disclosure statement. He also failed to file monthly operating reports or to pay the required fees to the United States Trustee ("UST") for over a year.¹ Therefore, the UST filed a motion to dismiss the Debtor's petition in November 2003, and the Appellant conditionally endorsed dismissal of the Debtor's petition.² Judge Somers conducted a hearing on the UST's motion to dismiss in April 2004, at which the Debtor consented to dismissal of his petition. However, the Appellant objected to dismissal because she had several motions still pending and because

¹ The United States Trustee is also an Appellee herein.

² The Appellant favored dismissal of the Debtor's petition only after an investigation into the Debtor's conduct during the pendency of the bankruptcy case.

she believed further investigation into the Debtor and his activities was warranted.

Judge Somers granted the motion to dismiss and prohibited the Debtor from refiling his petition for 180 days. The Appellant filed a motion to alter or amend the judgment dismissing the Debtor's petition, and Judge Somers entered an order entitled "Order Clarifying Judgment Dismissing Case, But Otherwise Denying Motion of Cheryl Myers to Alter or Amend That Judgment" that effectively denied the Appellant's motion to alter or amend. The Appellant sought an extension of time to appeal this order that was granted, and this timely appeal followed.

Standard of Review

This Court reviews a bankruptcy court's findings of fact under the clearly erroneous standard of review. See Hall v. Vance, 887 F.2d 1041, 1043 (10th Cir. 1989). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The Court reviews a bankruptcy court's conclusions of law under the de novo standard of review. See Hall, 887 F.2d at 1043.

Discussion

The central issue is whether the bankruptcy court erred by dismissing the Debtor's petition. The Court concludes that the bankruptcy court did not err and affirms the dismissal of the Debtor's petition.

Section 1112(b) of the Bankruptcy Code lists ten non-exhaustive reasons why a bankruptcy court may dismiss or convert a Chapter 11 petition "for cause." See 11 U.S.C. § 1112(b). The bankruptcy court has broad discretion under § 1112(b). See Hall, 887 F.2d at 1044.

Here, the bankruptcy court dismissed the Chapter 11 petition because the

Debtor failed to file monthly reports as required by Rule 2015(a)(3) of the Federal Rules of Bankruptcy Procedure.³ Indeed, the bankruptcy court barred the Debtor from refiling his petition for 180 days under 11 U.S.C. § 109(g).

The importance of these monthly report cannot be over-emphasized. “Without the required reports the creditors are unable to determine if the debtor is exercising its powers in a manner beneficial to them and non-compliance is prejudicial to their interests.” In re Modern Office Supply, Inc., 28 B.R. 943, 945 (Bankr. W.D. Okla. 1983). In In re Modern Office Supply, Inc., the bankruptcy court granted a motion to convert under § 1112(b) on grounds that the debtor-in-possession’s failure to file monthly reports caused “unreasonable delay” that was prejudicial to the creditors. See id. “The default on the part of the debtor to provide crucial and critical financial data as required by Court order, the Code and the Rules amounts to unreasonable delay sufficiently prejudicial to creditors within the meaning of § 1112(b)(3).” Id.

There is no dispute that the Debtor failed to file the critical monthly reports.⁴ Thus, the Court concludes that the bankruptcy court did not err in dismissing the petition.

The Appellant further argues that the bankruptcy court erred in dismissing the petition while she still had several motions pending. Chief among these motions is the motion seeking disqualification of Judge Pusateri. She also insists that Judge Somers should have disqualified himself.

The Court concludes that the Appellant’s motion to disqualify Judge Pusateri is moot since he had retired by the time the Appellant made her motion.

³ Rule 2015(a)(3) requires a debtor-in-possession to file “reports and summaries required by” 11 U.S.C. § 704(8).

⁴ The bankruptcy court based its dismissal on the Debtor’s failure to file the required monthly reports, but it is also undisputed that the Debtor did not file a disclosure statement or plan of reorganization.

The matter is now moot because “the issues presented are no longer live . . . [and] we are incapable of rendering effective relief or restoring the parties to their original position.” Behles-Giddens, P.A. v. Raft (In re K.D. Company, Inc.), 254 B.R. 480, 486 (10th Cir. BAP 2000).

The Appellant contends the mootness doctrine does not apply since she could raise the recusal issue in a post-judgment motion. See Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995); United States v. Cooley, 1 F.3d 985, 996 n.9 (10th Cir. 1993). The flaw in the Appellant’s argument is that even a post-judgment motion must be made within a reasonable time. See Fed. R. Bankr. P. 9024 (applying Rule 60(b) of the Federal Rules of Civil Procedure to bankruptcy proceedings). Under the Appellant’s theory for Judge Pusateri’s disqualification, the grounds for relief arose in 2001 when the Debtor filed his Chapter 11 petition. Because her request to disqualify Judge Pusateri was not filed within a reasonable time, the Court further concludes that the motion is moot.

As for the Appellant’s request to recuse Judge Somers, that issue is not properly before the Court because it was not properly raised before the bankruptcy court. In October 2003, counsel for the Appellant orally mentioned that Judge Somers had previously represented a bank in an action against the Appellant but emphasized he was not making a formal motion. No further action was ever taken. See Pro Finance, Inc. v. Spriggs (In re Spriggs), 219 B.R. 909, 912 n.3 (10th Cir. BAP 1998) (an appellate court will not consider an issue not raised below), aff’d, 166 F.3d 348 (10th Cir. 1998) (table).

The Appellant also filed three pro se motions before the bankruptcy court dismissed the petition.⁵ Those motions were extinguished when the petition was

⁵ Those motions are the following: (1) “Motion for Court Investigation of the Conduct of the Assistant United States Trustee, for Transmittal of Information Regarding Trustee’s Failure to Act and Suggestion for Order of Removal and Disqualification”; (2) “Motion for Entry of Order of Contempt Against the Debtor (continued...) ”

dismissed and are now moot. See In re Shar, 253 B.R. 621, 637 n.11 (Bankr. D. N.J. 1999) (noting that dismissal of Chapter 11 petition rendered other pending motions moot).

The final matters before the Court are several appellate motions. The first set of motions relates to extensions of time to file the Appellant's briefs. The Appellant filed several motions to extend the time to file each of her appellate briefs. When the Debtor objected to any further extensions, the motions for extension of time were referred to this panel. The Court has considered the motions and determines that they should be granted. Each brief will be considered timely filed.

The second set of motions relates to the record on appeal. In the Appellant's "Motion to Strike Portions of Debtor Appellee's Responsive Brief Containing Matters Outside the Record on Appeal, and Containing Matters Violating Bankruptcy Rule 9011, and Suggestion for Rule 9011(c)(1)(B) Sanctions" filed on March 3, 2005, she asks that portions of the Debtor's appellate brief be stricken because it refers to matters outside the record. She also requests the Court sanction the Debtor. On March 28, 2005, she filed another motion for sanctions against the Debtor, alleging the same grounds for sanctions as earlier. The final appellate motion is the Debtor's "Motion for the Court to Take Judicial Notice and to Amend the Appendix to Appellee's Brief," and the Appellant objects to this motion.

⁵ (...continued)

In Possession for Concealment of Debtor-in-Possession Michael B. Myers, L.L.C.[']s Activities, for Failure to Provide Monthly Reports to the United States Trustee for Debtor-in-Possession Account "Michael B. Myers, L.L.C.", and for Failure to File Monthly Reports with the Court for Debtor-in-Possession Account "Michael B. Myers, L.L.C." and for the Court to Notify the United States Attorney"; and (3) "Verified Motion for Order to Set Aside Order Granting Motion of First National Bank of Centralia for Relief from Automatic Stay and Debtor's Motion to Determine Equity in Real and Personal Property Secured by the First National Bank of Centralia and for Potential Limited Relief from Stay as Void and Obtained by Fraud on the Court."

Upon consideration, the Court denies this set of appellate motions. The portions of the Debtor's brief of which the Appellant complains played no role in the Court's decision on appeal. Instead, those matters raised in the appellate motions appear to be a continuation of the litigious relationship between the Appellant and the Debtor. These matters do not bear on the legal merits of the bankruptcy court's decision to dismiss the petition.

Conclusion

Accordingly, the Court hereby affirms the bankruptcy court's dismissal of the Debtor's Chapter 11 petition.